No. 83-2088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BAYOU BOTTLING, INC.,

Petitioner,

—v.—

DR PEPPER COMPANY and COCA-COLA BOTTLING COMPANY OF LAKE CHARLES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED*

On the facts of this case, did the district court and court of appeals err in concluding (i) that the failure of Petitioner (a bottler of Pepsi-Cola and 7-Up) to acquire its competitor (a bottler of Dr Pepper) was not an *antitrust* injury entitling Petitioner to recover treble damages, and (ii) that Petitioner was not entitled to equitable relief?

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* Pursuant to Supreme Court Rule 28.1, Respondent Dr Pepper Company states that it is a wholly-owned indirect subsidiary of DP Holdings, Inc.; Respondent Coca-Cola Bottling Co. of Lake Charles, Inc. states that it is a wholly-owned subsidiary of Baton Rouge Coca-Cola Bottling Company, Ltd.

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Abbreviation	*Reference*
Bayou	Petitioner Bayou Bottling, Inc.
Dr Pepper	Respondent Dr Pepper Company
LCC	Respondent Coca-Cola Bottling Co. of Lake Charles, Inc.
LCDP	Lake Charles Dr Pepper Company, Inc.
Pet.	Petition for certiorari
Pet. App.	Appendix to Petition for certiorari
[Deponent] dep., at —	Depositions
[Affiant] aff. ¶—	Affidavits
R —	Record on appeal

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RESPONDENTS' BRIEF IN OPPOSITION

This case is yet another in the list of "private state [law] suits masquerading as antitrust actions." *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4828 (U.S. June 19, 1984) (No. 82-1260; slip op. at 23). Lloyd Wilcox, the owner of the Lake Charles Dr Pepper Company, decided to sell the company and retire. Two firms expressed an interest in buying, Respondent LCC (the local bottler of Coca-Cola) and Petitioner Bayou (the local bottler of Pepsi-Cola and 7-Up). Wilcox decided to sell to LCC, and three years after Bayou's state court action against Wilcox was dismissed, this "antitrust" suit was filed. Bayou claimed that it was entitled to recover treble damages in the form of the profits that it would have made if it, rather than LCC, had made the acquisition.

The district court and a unanimous court of appeals both concluded that Bayou's claimed injury was not an "antitrust injury" under this Court's decision in ***Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.***, 429 U.S. 477 (1977), and entered summary judgment for Respondents. That determination was correct, and it presents no conflict with any decision of this Court or of any other court of appeals. Further appellate review is therefore unwarranted and certiorari should be denied.

STATEMENT

1. *The parties and the industry.* Petitioner Bayou is a wholesaler and distributor of soft drinks in southwest Louisiana; it sells Pepsi-Cola, 7-Up, and a large number of other soft drink brands. Respondent Dr Pepper manufactures concentrate for its trademarked Dr Pepper soft drink products; the concentrate is sold, pursuant to license agreements, to local bottlers. Respondent LCC bottles and distributes soft drinks in southwest Louisiana; it is a licensee of The Coca-Cola Company and, since 1976, Dr Pepper.

There are more than 50 soft drink concentrate manufacturers in the United States, including such firms as Coca-Cola, PepsiCo, Seven-Up, Royal Crown, Crush, and Dr Pepper. Typically, these firms sell their concentrates to local bottlers under exclusive territorial license agreements; the bottlers manufacture finished soft drink products and distribute the products in their licensed areas. Successful marketing depends upon widespread availability and frequent service, in-store rotation, and merchandising. Exclusive territorial licenses—which Congress approved in 1980 when it passed the Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-03—are necessary to induce the bottlers to perform these costly functions.

The brands of the smaller concentrate manufacturers, such as Dr Pepper, rarely generate sufficient volume in a given

territory to support an independent bottling operation of their own. Consequently, Dr Pepper, like many other concentrate manufacturers, often enlists local bottlers of other brands, such as Coca-Cola, Pepsi-Cola, 7-Up, and Royal Crown, to take on (or "piggyback") Dr Pepper and thus use their existing production and distribution systems to promote Dr Pepper in addition to their other brands. Through "piggybacking," Dr Pepper was able to increase retail consumption of its products from 96.3 million cases in 1968 to 299 million cases in 1978. (Antle aff. ¶¶ 4, 8).

2. *The LCDP acquisition.* In early 1975, Lloyd Wilcox, the owner of the local Dr Pepper bottling company (LCDP), decided to sell the company and retire. Two parties expressed an interest in buying, Bayou and LCC. Dr Pepper, believing LCC to be the more effective bottler, urged Wilcox to sell to LCC. After negotiating with both parties, Wilcox entered into a written agreement on April 25, 1975, for the sale of LCDP to LCC for $1,000,000. Bayou contends, however, that on April 23, 1975 (two days earlier), Wilcox orally agreed to sell to Bayou for $1,000,000. For purposes of their summary judgment motions, Dr Pepper and LCC have assumed this allegation (which they deny) to be true.[1]

In May 1975, Bayou sued Wilcox in Louisiana state court for specific performance of the alleged oral contract for the sale of LCDP. The state court dismissed the action, finding it barred by the statute of frauds, and Bayou did not appeal. Consummation of LCC's acquisition of LCDP had been held in abeyance pending the outcome of the state court suit, but in June 1976 LCDP was merged into LCC.

Bayou contends that, prior to LCC's acquisition of LCDP, LCC had a market share in excess of 45 percent, LCDP had a

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1 At the same time that Bayou and LCC were bidding for LCDP, they were also seeking to purchase the Dr Pepper bottler in the adjacent locality, Lafayette. The Lafayette bottler was in fact sold to one of Bayou's affiliates, and Dr Pepper approved the sale.

30 percent share, Bayou had 20 percent, and all remaining companies had less than 5 percent. Bayou also claims that, following the acquisition, LCC obtained a market share of more than 75 percent. Although Bayou's proposed relevant market and its market share calculations are completely divorced from reality, for purposes of their summary judgment motions, Dr Pepper and LCC have again assumed these allegations to be true.[2]

In the years after the acquisition, Bayou has fared well; between 1974 and 1979, its case sales doubled, its revenues increased from $2,210,000 to $4,200,000, and its profits increased steadily from a $214,000 loss to a profit of $263,000. (R 1119). Bayou's owners, who purchased the company in December 1976 for only $300,000 (Pet. App. 13), have realized a very substantial return.

3. *Proceedings below.* Bayou filed its complaint, seeking $45,000,000 in treble damages and a decree of divestiture, on February 23, 1979. After exhaustive discovery, Dr Pepper and LCC moved for summary judgment. The district court granted the motions (Pet. App. 11-42 (543 F. Supp. 1255)), and the Court of Appeals for the Fifth Circuit unanimously affirmed (Pet. App. 1-10 (725 F.2d 300)).

The court of appeals first addressed LCC's acquisition of LCDP and the injury that Bayou contended it suffered in that regard. Since Bayou's claimed injury was simply that Bayou had failed to purchase LCDP itself, the court concluded that Bayou had not met the "antitrust injury" requirements es-

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2 The lack of support for Bayou's allegations should nevertheless be mentioned. Apart from a completely unsupported assertion in an affidavit (Pet. App. 89), there was no evidence in the record supporting Bayou's allegation that LCC's Dr Pepper territory was a relevant geographic market. Much less was there any evidence to support Bayou's market share calculations; these were based entirely on the assertion of its president, Mr. Trahan (Pet. App. 51), who had previously testified that Bayou was "number two" in the market (with more sales than LCDP), and that it aimed to become "number one." (Trahan dep., at 306).

tablished by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Bayou's failure to acquire its competitor was not an injury that "flows from that which makes defendants' acts unlawful," *id.* at 489, and it was not an injury "of the type the antitrust laws were designed to prevent," *id.* (Pet. App. 5-7 (725 F.2d at 303-04)).

Having determined that the LCDP acquisition provided Bayou with no basis for a treble damage recovery, the court of appeals next analyzed Bayou's allegations of "exclusionary conduct"—LCC's conduct with regard to vending machines and shelf space and its allegedly "predatory" pricing. The court held that LCC was lawfully entitled to provide free maintenance for vending machines stocked only with LCC products and to prevent store owners from placing Bayou's soft drinks in vending machines owned by LCC; these were not "exclusionary" but, rather, "competitive acts." (Pet. App. 7-8 (725 F.2d at 304)). With regard to shelf space, the court noted that "Bayou [had] acknowledge[d] that store owners apportion their shelf space on the basis of sales and that LCC has only that portion consistent with its total share of the soft drink market" (Pet. App. 8 (725 F.2d at 304)); LCC was not required, as the district court put it, to "somehow compel store managers to give preference to its competitor's wares." (Pet. App. 34 (543 F. Supp. at 1267)). Finally, the court of appeals agreed with the district court that there was nothing "predatory" about LCC's discount prices for 32-ounce returnable bottles of Coca-Cola and Sprite; LCC's prices on its full line of soft drink products were far above its average total costs. (Pet. App. 8-10 (725 F.2d at 304-05)).[3]

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[3] The court of appeals saw no need to address two other Bayou allegations—one regarding its failure to obtain a license for Mr. PiBB, the other regarding the commercial failure of its product Dr. Nut. The district court had properly rejected these allegations: "With respect to the inability to obtain a franchise for Mr. PiBB, suffice to say here that all parties admit that the decision to grant franchises for this product only to Coca-Cola bottlers is a unilateral decision of the national Coca-Cola Company, which is not a party to this suit. Further, although it is apparent to the court that the failure of the

Thus, since Bayou had suffered no antitrust injury as a result of the LCDP acquisition and since the other conduct complained of was entirely lawful, the court of appeals affirmed the grant of summary judgment to Dr Pepper and LCC.

4. *The petition for certiorari.* Bayou's Petition raises four questions. The first three challenge the determination below that Bayou suffered no antitrust injury as a result of the LCDP acquisition. (Pet. i, 8-17). The fourth question asks whether Bayou was entitled to a decree of divestiture. (Pet. i, 17-21). The Petition does not seek review of the lower courts' rulings that Respondents did not engage in any predatory or exclusionary practices.

REASONS FOR DENYING THE WRIT

This is plainly not a case in which there are "special and important reasons" for granting certiorari. S. Ct. R. 17(1). The conclusion of the courts below that Bayou incurred no compensable "antitrust injury" by reason of its failure to acquire LCDP was but a routine application of the principles established by this Court unanimously in the *Brunswick* case. That determination is entirely consistent with the applicable decisions of this Court and the decisions of the other courts of appeals. Nor does the determination by the courts below that Bayou is not entitled to a decree requiring divestiture of LCDP present any issue worthy of Supreme Court review. Bayou has alleged no threatened injury that would entitle it to any equitable relief, including divestiture, and in any event the law is clear that divestiture is not a remedy available to a private plaintiff.

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attempt to promote Dr. Nut was in no way attributable to any anticompetitive conduct by the parties to this lawsuit, the court is precluded from considering this question by the principle of res judicata, since Bayou and Dr Pepper have already resolved this matter by means of settlement." (Pet. App. 32 (543 F.Supp. at 1266)).

I. The determination that Bayou suffered no antitrust injury as a result of the LCDP acquisition was correct and conflicts with no decision of this Court or of the other courts of appeals

A. A plaintiff in a private antitrust action cannot recover treble damages simply by proving that the defendants violated the antitrust laws and that the plaintiff suffered injury. The plaintiff must also show that his injury is "attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Accordingly, even if Bayou were able to establish that the LCDP acquisition violated the antitrust laws, and that the acquisition actually injured Bayou, those facts alone would not entitle Bayou to damages. As this Court held unanimously in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977):

> We . . . hold that for plaintiffs to recover treble damages on account of [an illegal acquisition], they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)); *accord, Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 910 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482 (1982).

Analysis of the injuries alleged by Bayou in this case and their relation to any anticompetitive effects that might have resulted from the LCDP acquisition demonstrates, as the courts below determined, that Bayou's claim fails both aspects

of the *Brunswick* test: (1) Bayou has not incurred injuries that "flow from that which [might have made the acquisition] unlawful" and (2) it has not incurred injuries "of the type the antitrust laws were intended to prevent."

1. If LCC's acquisition of LCDP violated sections 1 or 2 of the Sherman Act or section 7 of the Clayton Act—a proposition Respondents strongly deny but have accepted for purposes of their summary judgment motions—it was because the acquisition had one or more of the following effects: (a) eliminating competition between LCC and LCDP, (b) increasing concentration in the "relevant market" (i.e., reducing the number of competitors), or (c) giving LCC market power (i.e., the power to restrict output and increase prices). *E.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Union Pacific R.R.*, 226 U.S. 61, 88 (1912); Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers,* 80 Mich. L. Rev. 1155, 1160 (1982). Although these effects might have impaired competition in the market, they could not have caused injury to Bayou and, indeed, they are not the basis for any of Bayou's claimed damages. Rather, *all of the damages Bayou contends it suffered as a result of the acquisition are due to the fact that, because LCDP was acquired by LCC, Bayou was unable to acquire that company itself.*[4]

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4 Bayou's damages theory is set forth in its response to Dr Pepper Interrogatory No. 73 (R 319): "If the defendants' antitrust violations had not occurred, the present value of the plaintiff's business would be $10,000,000 more than what it actually is. This difference is based upon the fact that if the antitrust violations had not occurred, the plaintiff would now have the Dr Pepper franchise and would have strengthened the plaintiff's entire bottling operation, produced operating efficiencies and generated substantially increased sales, and further would not have to compete with a monopolist (the defendant Coca-Cola Bottling Co. of Lake Charles, Inc.) now, nor at any time from mid-1975 to the present. In addition to the differential in the present value of plaintiff's business, the loss in profits from mid-1975 to the commencement of the lawsuit arising from those factors totals $5,000,000. The total of those two figures produces the sum of $15,000,000." (See also Pet. App. 84-87; Byrnes dep., vol. 1 at 176-91).

Bayou argues that the fact that LCC, rather than Bayou, acquired LCDP injured Bayou in five ways: (a) Bayou "lost" sales of Dr Pepper products it would have made and economies of scale it would have obtained if it had acquired LCDP; (b) LCC became more efficient as a result of the acquisition, placing Bayou at a disadvantage; (c) LCC obtained the ability to charge higher prices; (d) LCC obtained an advantage in shelf space and vending machines; and (e) LCC obtained the ability to engage in predatory conduct. None of these allegations, even if established, would provide Bayou with a permissible basis for recovering treble damages.

a. First, with respect to Bayou's allegation of lost Dr Pepper sales and economies of scale (Pet. 5), Bayou's damages all result from the simple fact that someone other than itself acquired LCDP. As the courts below correctly perceived (Pet. App. 7 (725 F.2d at 304); Pet. App. 31 (543 F. Supp. at 1265-66)), those damages do not reflect the anticompetitive effect, if any, of the acquisition *by LCC*. Bayou would have suffered the very same "loss" of sales and scale economies if LCDP had been acquired by any independent third party or if Wilcox had retained it himself. Therefore, as *Brunswick* demonstrates, that "loss" is unrelated to any reason why LCC's acquisition of LCDP might be held unlawful.

In *Brunswick*, a bowling equipment manufacturer (Brunswick) acquired some 222 bowling centers from various companies that had defaulted on payments for equipment purchased from Brunswick. The plaintiffs, operators of competing bowling centers, proved that these acquisitions violated section 7 of the Clayton Act on the theory that, "because of its size [Brunswick] had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business." 429 U.S. at 481. The plaintiffs also proved that the illegal acquisitions caused them injury, based on the fact that if Brunswick had "allowed the defaulting centers to close, [plaintiffs'] profits would have increased." *Id.* Although the Court accepted the plaintiffs' theory of antitrust violation, it held that the damages sought could not be recovered because those

damages were "of no concern to the antitrust laws." *Id.* at 487. The Court said:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet [plaintiffs'] injury—the loss in income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. [Plaintiffs] would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . . .

Id. As the courts below recognized, the "lost" Dr Pepper sales and scale economies Bayou complains of here suffer from the same flaw. In this case, as in *Brunswick*, Bayou "would have suffered the identical 'loss'—but no compensable injury" if LCDP had been acquired by someone other than LCC or if it had not been sold at all.

Bayou finds fault with this analysis, contending that "any damage . . ., whether a competitive type injury or not, *could* result from a hypothetical cause not involving antitrust violation." (Pet. 15). Bayou misconstrues the lower courts' opinions. The courts below did not reject Bayou's claimed injuries because those injuries "could" have resulted from some other hypothetical cause. Rather, the district court and court of appeals both determined that Bayou's claimed injury bore no relation to anything that might have made LCC's acquisition anticompetitive. In making that determination, it was entirely appropriate for those courts to analyze whether Bayou would have suffered the identical injuries from the same injury-causing act even if no anticompetitive effects had occurred.[5] That comparative analysis served to highlight the

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[5] In applying *Brunswick*, the courts of appeals have consistently engaged in this sort of comparative analysis. *See, e.g.*, McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374-78 (8th Cir. 1983), *cert. pending*, No. 83-1659 (filed Apr. 10, 1984); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S.

more basic point—that Bayou's "loss" of the sales and scale economies it might have had if it had acquired the Dr Pepper franchise has nothing to do with any of the alleged anticompetitive effects of LCC's acquisition, i.e., the elimination of competition between LCC and LCDP, the reduction in the number of competitors in the "market," or the alleged creation of market power. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1133 (1976).

Similarly, Bayou is not aided by its allegation that it was injured because LCC's acquisition "blocked" an "improvement" in competition that would have occurred if Bayou had made the acquisition. (Pet. 5-6, 10). Even if Bayou's allegation were true—which it is not (see p. 15 below)—the "blocking" of Bayou's proposed acquisition is not "that which [might have made LCC's acquisition] unlawful" under *Brunswick*. 429 U.S. at 489. There are countless situations in which competition might be better off if, for example, company *A* were acquired by company *B* rather than company *C*. That does not make *C*'s acquisition unlawful. *C*'s acquisition would be unlawful only if it tended to lessen competition substantially, i.e., if it eliminated substantial competition between the merging firms, increased concentration unduly, or created market power. In this case, Bayou's claimed injury cannot be traced to any such possible effects, and Bayou's "blocking" argument is therefore irrelevant. *See Pennzoil Co. v. Texaco, Inc.*, 1984-1 Trade Cas. ¶ 65,848 (N.D. Okl.), *aff'd*, 1984-1 Trade Cas. ¶ 65,896 (10th Cir. 1984).

b. Second, Bayou contends that the acquisition decreased LCC's unit costs, increasing the "disparity" between LCC and Bayou and making it more difficult for Bayou to compete. (Pet. 6). This claim is nothing more than a complaint that the acquisition lowered LCC's costs and improved its efficiency. Yet a principal purpose of the antitrust laws is to *encourage*

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893 (1981); A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

firms to reduce costs and improve efficiency, and thereby lower prices to consumers. *See, e.g.*, *NCAA v. Board of Regents of the University of Oklahoma*, 52 U.S.L.W. 4928, 4932-34 (U.S. June 27, 1984) (No. 83-271; slip op. at 14-20); *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4827 (U.S. June 19, 1984) (No. 82-1260; slip op. at 18); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52-59 (1977); *E.I. duPont de Nemours & Co.*, 96 F.T.C. 653, 750-51 (1980); U.S. Department of Justice, *Merger Guidelines—1984* § 3.5 (June 14, 1984). Since an improvement in efficiency is procompetitive, and since the antitrust laws do not permit a plaintiff "to label increased competition as a harm," *Blue Shield of Virginia v. McCready*, 457 U.S. at 483 n.19, the fact that the acquisition made LCC more efficient cannot be a basis for treble damage liability. *See, e.g.*, 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 345, 346a, at 239-40, 247 (1978); *see also California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742 (9th Cir. 1979); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

c. Third, Bayou claims that the LCDP acquisition had the effect of enabling LCC to charge higher prices. (Pet. 6). But Bayou nowhere explains how it could possibly have been injured in this regard. If Bayou's assertion that the acquisition resulted in increased prices were correct, Bayou would have *benefited* from the acquisition; the higher the prices charged by LCC, the greater Bayou's sales and profitability would necessarily be. Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. at 1160; *see also Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. at 909-10; *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 211 (3d Cir. 1980).

d. Fourth, Bayou contends that the acquisition has given LCC an advantage in shelf space and vending machines. (Pet. 12-13). Since it is undisputed that Bayou's percentage of the local shelf space and its share of the vending machine placements were both unaffected by the acquisition (Pet. App. 18-19, 32-34 (543 F. Supp. at 1260, 1266-67)), it is evident that

Bayou has suffered no injury whatsoever in this regard. Bayou's argument seems to be that LCC, having acquired LCDP, must now donate space to Bayou in its vending machines and convince store owners to give Bayou's products preferential treatment on the shelf. As this Court has held repeatedly, however, the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *accord*, *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. at 4825 n.14 (slip op. at 13 n.14). Bayou's shelf space and vending machine "disadvantage" thus cannot be a basis for treble damages. *See also* 2 Areeda & Turner ¶ 346a, at 247.

e. Finally, Bayou alleges that the acquisition enabled Respondents to engage in what Bayou describes as predatory conduct, i.e., predatory pricing of Coca-Cola and Sprite in 32-ounce returnable bottles, depriving Bayou of Mr. PiBB and Dr. Nut, and exclusionary practices with respect to shelf space and vending machines. (Pet. 6-7).

If Bayou could have proved that it was the victim of predatory conduct, the resulting damages would have been recoverable. But the mere fact that the acquisition may have given LCC the power to engage in predatory practices gives Bayou no right of recovery, for it is the actual exercise of market power to inflict injury upon a plaintiff—not the mere possession or acquisition of the power—that entitles a private plaintiff to damages. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 487-89; *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374-79 (8th Cir. 1983), *cert. pending*, No. 83-1659 (filed Apr. 10, 1984). As Professors Areeda and Turner explain, if a merger is condemned because it tends to give the acquiring firm sufficient market power to engage in predatory conduct, that does not mean "that any predatory activity has occurred. Of course, if any actual predation does occur, the resulting damages would be compensable . . . ." 2 Areeda & Turner ¶ 345, at 238-39. In other words, Bayou cannot recover simply by proving that the

LCDP acquisition was illegal because it gave LCC the power to engage in predatory conduct; for if LCC really had engaged in any predatory practices, any damage suffered by Bayou would not have been caused *by the acquisition*, but by the predatory practices themselves. If Bayou had wanted to recover damages caused by Respondents' alleged predation, Bayou would have had to have shown that predation in fact occurred; proof that the acquisition was illegal, without proof of actual predation, does not entitle Bayou to damages.[6]

Moreover, the damages Bayou is seeking to recover as a result of the acquisition are unrelated to any possible predation. Bayou's damage theory is that it is entitled to the profits it would have earned if it, rather than LCC, had acquired LCDP. (See pp. 8-11 above). Those may be damages caused by the acquisition, but they have nothing to do with any predation. Therefore, as *Brunswick* makes plain, those damages cannot be recovered even if it were assumed that the acquisition was illegal.

The plaintiffs in *Brunswick* claimed that they were injured by a pattern of "predatory" conduct, supported by the defendant's "deep pocket," including its installation of new equipment unavailable to the plaintiffs, its price cutting, and its operation of bowling centers at a loss for over five years after the acquisitions at issue were made. Brief for Respondents at 8-13, 27-30, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (No. 75-904); *see also* 429 U.S. at 490. The plaintiffs' damage theory, however, was not based on the alleged predation; it was based on the fact that the acquisition prevented the acquired bowling alleys from going out of business. Since those damages were not caused by the predatory conduct, and thus were unrelated to the reasons for

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6 Bayou argued in the lower courts that, in fact, it had been injured by predatory conduct, but the courts below properly ruled that Respondents' conduct was in no way predatory (Pet. App. 7-10 (725 F.2d at 304-05); Pet. App. 31-37 (543 F. Supp. at 1266-68)), and Bayou has not challenged those rulings here. (Pet. i, 8-21).

holding the acquisition unlawful, the Court held that they could not be recovered. 429 U.S. at 487-90.

2. The courts below were also correct in holding that Bayou's claimed injuries are not "of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489. The antitrust laws were just not designed to prevent "damages" caused by a firm's failure to acquire its competitor—especially under the circumstances here. Bayou's damages claim could have been dismissed for that reason alone.

In this case, a local Dr Pepper bottling company was sold to the local bottler of Coca-Cola, rather than to Bayou, the local bottler of Pepsi-Cola, 7-Up, and a host of other popular soft drink brands. (Pet. App. 13 n.1). Although Bayou claims that the acquisition was unlawful, if Bayou's analysis of the relevant market is correct, the acquisition would have been just as illegal if Bayou had been the acquiror. If the market shares alleged by Bayou were accepted, the acquisition by Bayou of LCDP would have resulted in the merger of a 20 percent firm with a 30 percent firm, and reduced the number of major competitors in the market from three to two. Such a merger would clearly be unlawful. *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Thus, Bayou is claiming injury because it failed to make an acquisition which, by the force of Bayou's own analysis, would have violated the antitrust laws. No such injury is "of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489; *see Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 569-70 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

B. The decision below is entirely consistent with (1) the applicable decisions of this Court and (2) the decisions of the other courts of appeals.

1. This Court has addressed questions relating to antitrust damages in four recent cases—*Brunswick*, *J. Truett Payne*,

McCready, and *Associated General Contractors*. The court of appeals relied on all four of those decisions in upholding the judgment in Respondents' favor. (Pet. App. 4-7 (725 F.2d at 303-04)). Bayou does not even purport to claim that the decision below conflicts with *Brunswick*, *J. Truett Payne*, or *Associated General Contractors*, but it seems to imply a conflict with *McCready*. (Pet. 16-17). *McCready* is in no way contrary to the decision below. A principal anticompetitive effect of the conspiracy there between Blue Shield and the psychiatrists was that consumers, such as the plaintiff, were prevented from making a free choice between obtaining the services of psychologists and psychiatrists. The plaintiff's injury—nonreimbursement for payments to her psychologist—flowed directly from that anticompetitive effect, as the Court found. 457 U.S. at 483-84. Bayou's claimed injuries here, in contrast, bear no relation to the alleged anticompetitive effects of the acquisition, as the court of appeals correctly ruled. (Pet. App. 6-7 (725 F.2d at 303-04)).

2. Bayou's statement at the outset of its argument that the decision below "conflicts with decisions of other federal courts of appeal" (Pet. 8) is difficult to understand, for the remainder of the Petition fails to identify a single decision even arguably in conflict with the decision below. The plain fact of the matter is that the court of appeals' routine application of *Brunswick* is completely consistent with every other circuit court decision on the point. (See p. 10 n.5 above). Bayou's imagined intercircuit conflict provides no basis for granting plenary review.

II. The courts below correctly dismissed Bayou's claim for divestiture

The rejection by the courts below of Bayou's claim for divestiture presents no issue warranting review on certiorari. Bayou has provided no basis on the facts of this case for obtaining any equitable relief, and in any event divestiture is not a remedy available to a private plaintiff.

A. Bayou has not sought an injunction against any future conduct by Respondents; its sole claim for equitable relief is its claim for divestiture. Yet the antitrust violations alleged by Bayou and their relationship to Bayou's claimed injuries make it plain that there is no basis for divestiture in this case even if that remedy were available.

A plaintiff is not entitled to equitable relief in an antitrust case unless he can prove a threatened antitrust injury, i.e., a threatened injury that reflects the likely anticompetitive effects of the alleged violation. *Schoenkopf v. Brown & Williamson Tobacco Co.*, 637 F.2d 205, 210-11 (3d Cir. 1980) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489); *accord*, *Central National Bank v. Rainbolt*, 720 F.2d 1183, 1186-87 (10th Cir. 1983); *Carter Hawley Hale Stores v. The Limited*, 1984-1 Trade Cas. ¶ 66,046, at 68,634-36 (C.D. Cal. 1984). As discussed at pp. 7-16 above, Bayou failed to establish that it had suffered any actual antitrust injury on the facts here. Since Bayou also failed to show that any future antitrust injury was threatened, it had no basis for a claim to any kind of equitable relief—as the courts below properly concluded. (Pet. App. 10 (725 F.2d at 305); Pet. App. 40-42 (543 F. Supp. at 1269-70)).

Bayou's request for a divestiture order was especially unwarranted. Equitable relief in a private antitrust case must bear a logical relationship to the injury to the plaintiff caused by the defendant's illegal conduct. *See, e.g.*, *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 669 F.2d 490, 495 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982); *Schoenkopf*, 637 F.2d at 210. For example, if Bayou had been able to prove that Respondents had engaged in predatory conduct, and that predation was likely to recur, the proper equitable relief would have been an injunction directly prohibiting the conduct—but not divestiture. *Ohio-Sealy*, 669 F.2d at 495. In this case, as the courts below correctly determined, Bayou failed to demonstrate any exclusionary conduct on the part of Respondents. At most, Bayou raised an issue of fact as to the legality of the acquisition of LCDP. But if Bayou is correct in its allegation that the

LCDP acquisition will lessen competition, it is difficult to see how Bayou would be injured; the most likely result is that Bayou would *benefit* by having to face less competition. *See Schoenkopf*, 637 F.2d at 211; *Carter Hawley*, 1984-1 Trade Cas. at 68,635-36; Easterbrook & Fishel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. at 1160. In any event, Bayou failed to allege any threatened harm to itself flowing from an anticompetitive effect of the acquisition that a divestiture order would remedy. That failure made it entirely appropriate for the courts below to reject Bayou's claim for divestiture without reaching the question whether divestiture is available in a private action.[7]

B. Divestiture is a drastic remedy that can have serious adverse consequences for the stockholders, officers, and employees of the companies involved. *See United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *id.* at 350-55 (Frankfurter, J., dissenting). Although courts have ordered divestiture in antitrust suits brought by the Government, *see, e.g., id.*, in the 70-year history of section 16 of the Clayton Act, 15 U.S.C. § 26, no company has ever been divested as a result of a decree in a private action. That fact is compelling evidence that the remedy is not available at the hands of a private suitor.

Bayou cites no court of appeals decision holding that divestiture is available in a private case, for no circuit court has so held. The one appellate decision Bayou cites (Pet. 18), *NBO Industries Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262

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7 Bayou's claim for divestiture would have to be rejected anyway because Bayou was guilty of laches. Bayou did not file this action until February 1979, and never sought to obtain any preliminary injunctive relief in the interim. During the hiatus of almost four years after the acquisition agreement, the bottling and distribution of Dr Pepper were integrated into LCC's general operations. Granting dissolution in this case would thus seriously disrupt the distribution of Dr Pepper in the Lake Charles area, and it would punitively deprive LCC of the substantial investment it has made in the goodwill of the Dr Pepper brand over the last eight years.

(3d Cir. 1975), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), declined to reach the question. *Id.* at 279 ("we need not, in this case, decide a rule of general application with respect to the availability of divestiture relief under § 16").[8]

The leading case on the point is *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975). The court there carefully reviewed the legislative history of section 16 and concluded that, in enacting a general provision allowing "injunctive relief," Congress had not intended to allow private parties the extraordinary remedy of dissolution or divestiture. For example, the court noted the statement during the hearings of Congressman John Floyd, a member of the House Judiciary Committee which reported the Clayton bill. Congressman Floyd said:

> We did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has . . . . We discussed that very thoroughly among ourselves and we decided he should not have [it].

Hearings on Trust Legislation Before the House Committee on the Judiciary, 63rd Cong., 2d Sess. 842 (1914) (quoted in 518 F.2d at 922). *Accord, e.g., Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1059-60 (6th Cir. 1984); *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). This conclusion is in accord with the contemporaneous view of section 16 as expressed in a

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8 A few district court decisions have indicated that divestiture is available, *e.g.*, Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 638 & n.* (S.D.N.Y 1975), but the discussion in each case was hypothetical because divestiture was never required. One recent case, Parrish's Cake Decorating Supplies, Inc. v. Wilton Enterprises, 1984-1 Trade Cas. ¶ 65,917 (N.D. Ill. 1984), purported to order divestiture, but the defendant's interest in the acquired company had been sold prior to the issuance of the decree.

unanimous line of decisions in the 12 years after the statute was passed. *Continental Securities Co. v. Michigan Central R.R.*, 16 F.2d 378, 379-80 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924); *Venner v. Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918). As Judge Learned Hand said in 1924: "I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act." *Graves*, 298 F. at 762.

Thus, the law is clear that divestiture is unavailable as a remedy in a private action. And since there is no conflict in the circuits in this regard, there is no reason for granting plenary review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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